SUPREME COURT U. S.

AUG 28 1969

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ——— 526

DAN SHERIDAN O'LEARY, III,
WILLIAM MURRELL,
KHRISTINA LEWIS, and
ROGER A. WOOCK, - - - - - - Appellants,

—Against—

COMMONWEALTH OF KENTUCKY, - - Appellee.

On Appeal form the Court of Appeals of Kentucky.

JURISDICTIONAL STATEMENT.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

DAN SHERIDAN O'LEARY, III,
WILLIAM MURRELL,
KHRISTINA LEWIS, and
ROGER A. WOOCK, - - - - *Appellants,*

v.

COMMONWEALTH OF KENTUCKY, - - *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

JURISDICTIONAL STATEMENT.

THE OPINION BELOW.

The opinion of the Court of Appeals of Kentucky, affirming the convictions of the appellants, is reported in Southwestern Reports, Second Series, Vol. 441, page 150. A copy of the opinion is set forth as Appendix A. No opinion was rendered by the court of first instance.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. This is an appeal from a conviction of breach of the peace, in violation of Kentucky Revised Statutes, 437.010. The appellants were convicted of the offense in the Circuit Court of Fayette County, Kentucky, and

their conviction was affirmed by the Court of Appeals of Kentucky. The essential contention of the appellants is that their conviction was violative of their rights under the First and Fourteenth Amendments to the Constitution of the United States. Both in the lower court and in the Court of Appeals the appellants drew into issue the validity of Kentucky Revised Statutes, 437.010 (hereinafter referred to as KRS 437.010), on the ground of its being repugnant to the First and Fourteenth Amendments, and the decision was in favor of its validity.

2. The decision of the Kentucky Court of Appeals, together with the opinion, was rendered on May 9, 1969. Under Kentucky law a decision of the Court of Appeals does not become final until the mandate is issued. The mandate is ordinarily issued thirty days after the opinion is delivered unless a petition for rehearing is filed. Rules of the Kentucky Court of Appeals, R 1.340. The appellants did not file a petition for rehearing in the Court of Appeals, and the mandate was issued on June 10, 1969. A copy of the mandate is set forth as Appendix B. Notice of Appeal to this Court was filed in the Court of Appeals of Kentucky on June 27, 1969. A copy of the Notice of Appeal is set forth as Appendix C.

3. Jurisdiction of the appeal is conferred by Title 28, U.S.C. § 1257(2).

4. Cases sustaining the jurisdiction of this Court are: *Cox* v. *State of Louisana*, 379 U. S. 536 (1965); *Mills* v. *State of Alabama*, 384 U. S. 214 (1966); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Charleston Fed-*

eral Savings and Loan Association v. *Alderson,* 324 U. S. 183 (1945).

5. The proceedings involve a challenge to the validity of KRS 437.010, which provides as follows:

> "Any person who is guilty of a breach of the peace, riot, rout, unlawful assembly or affray shall be fined not more than one hundred dollars or imprisoned for not less than five nor more than fifty days, or both."

Kentucky Revised Statutes, Vol. 4, Tit. 437, P. 66 (1962).

QUESTIONS PRESENTED BY THE APPEAL.

1. Whether KRS 437.010 on its face and as authoritatively construed, is unconstitutional as vague and overbroad in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Whether the application of KRS 437.010 to the appellants in the case at bar violates the First and Fourteenth Amendments to the Constitution of the United States in that the appellants have been convicted solely for engaging in protected acts of expression?

3. Whether the appellants have been deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the record is totally devoid of evidence to support a conviction for breach of the peace, and that, in effect, the appellants were convicted of the offense of trespass, for which they were not charged?

STATEMENT OF THE CASE.

The appellants were regularly enrolled students at the University of Kentucky on November 6, 1967, when the Defense Intelligence Agency (D.I.A.) and other prospective employers were holding recruiting interviews on the University of Kentucky campus. These interviews were being conducted on the second floor of the Old Agricultural Building in the Placement Service hallway. The appellants and other regularly enrolled students undertook to protest against D.I.A.'s presence on the university campus and to dissuade students from accepting employment with the agency. In the morning Associate Dean of Students Hall met with the group of student protestors in order to establish the conditions under which the protest could take place. At that time the students were permitted to make their protest on the second floor of the Old Agricultural Building where the Placement Service was located. The protest essentially consisted of passing out leaflets. By the morning's end approximately seventeen students were engaged in the protest and five members of the press were also present.

The D.I.A. interviews were to take place at 1:30 p.m. Shortly before 1:00 p.m. Associate Dean Hall and Assistant Dean Brandenburg met with the recruiters from the D.I.A. and other agencies. The recruiters from the D.I.A. set forth certain conditions that would have to be met in order for them to stay (R. 58-59). Apparently one of these conditions was that the protestors would have to leave the second floor, where the

recruiting was to take place, for Associate Dean Hall then stated:

> "At approximately 1:00, after talking with the various agencies and their representatives that were doing placement in the Ag Building, it was determined that we were unable to continue the operation of the Placement Service with any amount of normality" (R. 38).

According to Assistant Dean Brandenburg, Associate Dean Hall told the students that:

> ". . . a point in time had been reached where their presence was constituting an interference and interruption of the University Placement Service Activities, and he asked them to remove themselves either to the general or the public lobby area on the first floor or to the outside of the building, either place they chose, but that the circumstances at that point made it necessary for him to ask them to remove themselves because they were interfering with the operation of the Placement Service" (R. 60-61).

All of the students and the press representatives then left the floor with the exception of the four appellants.

The appellants stood in the entrance to the alcove which led to three rooms, two of which were to be used at 1:30 p.m. by the D.I.A. They refused to leave when requested by Associate Dean Hall and moved inside the alcove, sitting down on the floor in front of the doorways to the two rooms to be used by the D.I.A. During the time they were present in the alcove, in the words of the Court of Appeals, ". . . they did not raise

their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not directly prevent anyone from entering any of the rooms. This was equally true of their conduct throughout the day." 441 S. W. 2d at 153. Associate Dean Hall then called the campus police, who asked the appellants to leave and advised them that if they did not leave, "they would be arrested and charged with breach of the peace." *Ibid.* When they still refused, they were arrested by the campus police, and without offering any resistance, were carried down the stairs and out of the building into the waiting campus police cruiser. As a result of the removal of the appellants the D.I.A. was able to carry out its interviews without having any protestors present on the second floor.

The appellants were tried for breach of the peace in the Lexington Police Court. Their constitutional challenges were rejected, and they were convicted and sentenced to fifty days imprisonment and to pay a fine of $100, the maximum penalty under the statute (R. 2). An appeal was then taken to the Fayette Circuit Court, and under Kentucky law such an appeal entitled the appellants to a trial *de novo*. In the Circuit Court their motion to dismiss based on the unconstitutionality of KRS 437.010 under the federal and Kentucky constitutions was overruled, and the case proceeded to trial before a jury (R. 31-32). At the conclusion of all the evidence appellants moved for a directed verdict, which was also denied (R. 98-99). The judge instructed the jury that under Kentucky law:

> "A breach of the peace is a violation of public order or decorum; the offense of disturbing the public peace. By 'peace' is meant the tranquility enjoyed by the citizens of the community, where good order reigns among its members." 441 S. W. 2d at 154.

He also instructed the jury that they should find the appellants guilty if they believed that the appellants:

> ". . . . did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky by blocking the entrance to the Placement Service. . . ." 441 S. W. 2d at 153.

The jury found the appellants guilty and fixed the punishment of each at a fine of $75.

On appeal to the Kentucky Court of Appeals, the conviction of each appellant was unanimously affirmed, and the constitutional challenge to the validity of KRS 437.010, on its face and as applied, was rejected. In so doing the Court stated that the "conduct of the appellants could have amounted to a breach of the peace only after their right to be present at the time and place in question had been terminated," 441 S. W. 2d at 154, so that the basis of the conviction was the failure of the appellants to leave the premises when ordered to do so by the Association Dean of Students and the campus police. The Court also held that the conduct of the appellants in failing to leave when ordered constituted a breach of the peace under Kentucky law, con-

trary to the contention of the appellants that they were entitled to a directed verdict on the ground that there was no evidence to support their conviction for the offense. Following the issuance of the mandate by the Kentucky Court of Appeals, appellants filed Notice of Appeal to this Court.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

The case presents substantial questions concerning the right of university students to peacefully protest against non-academic activities being conducted on the university campus and concerning the power of a state to employ the common law concept of breach of the peace to punish persons engaging in acts of expression. Previous decisions of this Court in cases such as *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 296 (1963), and *Cox* v. *Louisiana*, 379 U. S. 538 (1965), would seem to preclude a state from employing the common law concept of breach of the peace to punish persons engaged in acts of expression. Likewise, in *Ashton* v. *Kentucky*, 384 U. S. 195 (1966), this Court prohibited Kentucky from punishing persons under the common law offense of seditious libel on the ground that the concept of breach of the peace was embodied in that offense, so as to render it unconstitutionally vague and overbroad. In that case the Kentucky Court itself stated that "the ancient broad common law concept of what constituted a 'breach of the peace' is no longer a constitutional

basis for imposing criminal liability." *Ashton* v. *Commonwealth,* Ky., 405 S. W. 2d 562 (1965). In the case at bar, in order to sustain the convictions of the present appellants, the Court repudiated that statement. 441 S. W. 2d at 156. Its action calls into question the basis of the decisions of this Court in *Cantwell, Edwards, Cox, Ashton,* and similar cases, where this Court has held that in the area of First Amendment rights the government may regulate "only with narrow specificity." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). The Kentucky Court also holds that a peaceful sit-in by students at a university building becomes illegal and shorn of First Amendment protection whenever a university official orders the students to leave the particular area, irrespective of the number of students involved, the purpose of the protest, whether it in fact has interfered with the rights of others, and whether or not the intention of the university official was to stifle the exercise of expression. The campus of a state university is likened to private property, and according to the Court, "the privilege of an enrolled student to use and occupy the property of a school is and should be subject to the will of its governing authorities." 441 S. W. 2d at 157. By so holding it calls into question the decisions of this Court in case after case upholding the right to conduct peaceful sit-ins and demonstrations on public or private property. *Cox* v. *Louisiana, supra; Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Brown* v. *Louisiana,* 383 U. S. 131 (1966). Finally the Kentucky Court held that the sitting in and refusal to disperse when ordered, without more, justified a con-

viction for breach of the peace. This, it is submitted, is inconsistent with the decisions of this Court in cases such as *Garner* v. *Louisiana, supra; Thompson* v. *City of Louisville,* 362 U. S. 199 (1960); *Gregory* v. *City of Chicago,* —— U. S. ——, 89 S. Ct. 946 (1969), where the Court found that the record was totally devoid of evidence to support a conviction of the offense charged.

A. KRS 437.010, on Its Face, and as Authoritatively Construed, Is Unconstitutional, as Vague and Overbroad in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

A peaceful sit-in or demonstration where the protestors "did not raise their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not prevent anyone from entering a place" is a form of expression entitled to the protection of the First Amendment. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 538 (1965); *Garner* v. *Louisiana,* 368 U. S. 157 (1961).

While a state may constitutionally regulate this type of expression and punish abuses, it may only do so by a narrowly-drawn statute dealing with a specific type of conduct which the state may legitimately prohibit. *Adderley* v. *Florida,* 385 U. S. 39 (1966).

Ever since *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), it has been held that the common law offense of breach of the peace could not be employed to punish one who was attempting to engage in a constitutionally-protected act of expression. Such punishment was "analogous to a conviction under a statute sweeping

in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." 310 U. S. at 308. That principle was reaffirmed in *Edwards* v. *South Carolina, supra,* involving the common law offense, and in *Cox* v. *Louisiana, supra,* where the Court invalidated a statute that prohibited "congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." In *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), the Court invalidated a conviction for the common law offense of seditious libel, likening that offense to the offense of breach of the peace, which was condemned in *Cantwell.* It concluded that:

> "All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as by Kentucky judges." 384 U. S. at 201.

The case at bar squarely presents the question of whether the common law crime of breach of the peace, as defined by Kentucky judges, is now a constitutional basis for imposing criminal liability despite the holdings of this Court in *Cantwell* and *Ashton.*

The definition of the offense of breach of the peace by the Kentucky Court of Appeals in the case at bar, 441 S. W. 2d at 154, which must be accepted as authoritative by this Court, *Winters* v. *New York,* 333 U. S. 507 (1948), is as follows:

> "The term 'breach of peace' is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace or quiet, of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment." *King* v. *Commonwealth,* 32 Ky. L. Rep. 79, 80, 105 S. W. 419 (1907).

Aware that the literal language is admittedly broad, the Court in the case at bar went on to say that "lawful and proper conduct does not constitute a breach of the peace just because it provokes violence or disorder." It then stated that "the lawful exercise of a constitutional right cannot be a breach of the peace," citing *West* v. *Commonwealth,* 208 Ky. 735, 271 S. W. 1079 (1925). It concluded that "we, therefore, do not feel that the law against breach of the peace, as it has been thus construed in Kentucky, is so vague or overly broad in scope as to pose any threat to the rights of free speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States." It adds that, "Indeed, it occurs to us that if there is any uncertainty in this context, it is not because the tried and settled law of breach of the peace is vague, but because the burgeoning scope of constitutional protections has become so." 441 S. W. 2d at 154.

Certainly it is true that, in terms of ultimate result, the lawful exercise of a constitutional right cannot be a breach of the peace. But this is true of any offense, even one prescribed under a narrowly-drawn

statute. A conviction will always be reversed where the statute is applied to constitutionally-protected conduct. This is something very different from the void on its face doctrine, as developed by decisions of this Court. As this Court observed in *NAACP* v. *Button*, 371 U. S. 415, 432-433 (1963):

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper interpretation. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity."

The possibility of application of the common law concept of breach of the peace, as defined by the Kentucky Court, cannot help but have a chilling effect upon the exercise of "provocative" First Amendment freedoms, notwithstanding the possibility that after a prosecution has occurred, particular conduct may be found to have been "constitutionally protected."

More significantly, the very case which the Court of Appeals cited for the proposition that "the lawful exercise of a constitutional right cannot be a breach of the peace," saw that Court *sustaining a conviction for*

breach of the peace where the appellant was clearly engaged in constitutionally protected conduct. In *West* v. *Commonwealth, supra,* the conduct relied on to sustain the conviction was that the defendant led a Ku Klux Klan parade in which the marchers were masked and were carrying "provocative" banners. In holding that the defendant could properly be convicted of breach of the peace, the Court made the following observations: (1) the Ku Klux Klan was popularly understood to antagonize certain religions and races; (2) judicial officers considered a masked parade on the street a violation of the law and so advised the defendant, who was also the chief of police; (3) provocative banners were carried; (4) a large crowd was present. It concluded that:

> "Whatever the intent, it was sufficient to provoke an answer, and under the circumstances, was calculated to arouse violent resentment and retaliation in the opposing party. If, instead of the printed words, the language quoted had been shouted by the marchers, it must be admitted that this would have disturbed the onlookers and created a breach of the peace. It seems to us that under all the circumstances it was for the jury to say whether or not such offense was committed." 271 S. W. at 1081.

A decision more contrary to the decision of this Court in *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), both in terms of holding and rationale, cannot be imagined. The Kentucky Court in *West* permitted a conviction for breach of the peace to be sustained if the parade and speech "stirred people to anger, invited public dis-

pute, or brought about a condition of unrest." That, this Court said in *Terminiello,* cannot be done. 337 U. S. at 5.

By the very case it cites to support the proposition that the offense of breach of the peace, as construed by the Kentucky courts, is not unconstitutionally vague and overbroad, the Kentucky Court of Appeals proves the opposite. *West* v. *Commonwealth* makes it very clear that constitutionally-protected conduct *can* constitute a breach of the peace in Kentucky. While the Court says in the case at bar that lawful and proper conduct may not constitute a breach of the peace just because it provokes violence and disorder, when faced with the specific question, it upheld a conviction solely on the ground that in the circumstances the expression was provocative, and hence, "unlawful." Quite contrary to the assertion of the Kentucky Court, 441 S. W. 2d at 155, *West* v. *Commonwealth,* which the Court cited approvingly, *does* indicate "that the law against breach of the peace did then and does now prohibit constitutionally protected conduct."

All the infirmities of the conviction of the common law crime of breach of the peace as defined by Connecticut judges are equally present in the conviction of the common law crime of breach of the peace as defined by Kentucky judges—and maybe even more so. If it is true that "because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity," Kentucky may not constitutionally convict the present appellants under its breach of the peace statute.

B. The Application of KRS 437.010 to the Appellants in the Case at Bar Violates the First and Fourteenth Amendments to the Constitution of the United States in That the Appellants Have Been Convicted Solely for Engaging the Protected Acts of Expression.

It is not disputed that the conduct for which the appellants were convicted was the "sit-in" or "blocking" of the entrance to the rooms to be used by the D.I.A. and the refusal to leave when ordered. There was no interference with any person's use of the premises, nor was there even a hostile crowd threatening counteraction. Cf. *Cox* v. *Louisiana,* 379 U. S. 436 (1965). The appellants were four in number, protesting "by their silent and reproachful presence" the recruiting that was about to take place, but they had not by their actions made it impossible for the recruiting to go on as scheduled. The situation differs markedly from that in *Adderley* v. *Florida,* 385 U. S. 39 (1966), for example, where some 200 demonstrators had congregated at the jail entrance, making it impossible for vehicles to enter.

Recognizing this and recognizing that there was no narrowly-drawn trespass statute, as in *Adderley,* the Kentucky Court held the sit-in of the present appellants was not constitutionally protected, because "the premises of a public college or university were no different from private property." 441 S. W. 2d at 156. Since this was so, the Court reasoned, the university officials could exclude the students from the place where they were and the failure of the students to leave when

ordered could constiutionally be punished as a breach of the peace. The Court stated:

> "The privilege of an enrolled student to use and occupy the property of the school should be subject to the will of its governing authorities. If he is told to stay out of a particular room, building, or familiar trysting place, he enters it as a trespasser. Here, the appellants entered the area in question by lawful permission, implied if not express, and albeit their acts and conduct were not illegal, and not a breach of the peace, they were in a place from which the university had the right to exclude them. Their conduct in remaining thus assumed a different cast and significance after they had been asked to leave. They knew then that they were in a place they had no right to be." 441 S. W. 2d at 150.

In view of the Kentucky Court, then, since the premises of the university were equivalent to private property, university officials had an absolute right to exclude the appellants, and their failure to leave constituted a breach of the peace, which the state could constitutionally punish.

The campus of the University of Kentucky in Lexington is an open one. It is a "small city," in which some 15,000 students, over 1,000 faculty members, thousands of employees, and numerous other people enter every day. There are no guards preventing pedestrian entry onto the campus or into any building. It is certainly as open to the public as was the courthouse building in *Cox* v. *Louisiana*, 379 U. S. 536 (1965), or the department store in *Garner* v. *Louisiana*,

368 U. S. 157 (1961), or the library in *Brown* v. *Louisiana*, 383 U. S. 131 (1966). It is not built for security purposes and closed to the public, as was the jail in *Adderley* v. *Florida*, *supra*. If anything, a university is the place where free expression should be encouraged and only the most exigent of circumstances should justify any restriction.

However, even accepting the analogy to private property, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1945). The facilities of the university, including the second floor of the Old Agricultural Building were open to the general public, and the appellants, as students in the university, certainly had no less right than anyone else to be there. Moreover, they were there for a specific purpose, to protest the recruiting by the D.I.A. at the place where the protest would be most effective—the site of the recruiting. Only the most compelling of circumstances could have justified the exclusion of the protestors from the second floor. But they were excluded, and all left save the four appellants, who did nothing but sit in front of the entrance to the rooms that were going to be used for the recruiting. They should not be deemed to have lost the protection of the First Amendment on the ground that they were "in a place where they had no right to be." They were not on property that was closed to the general public.

It may be conceded that the university "had the power to preserve the property under its control for

the use to which it is lawfully dedicated." *Adderley* v. *Florida, supra.* But as this Court made clear in *Adderly,* that power may not be exercised to suppress First Amendment rights, and may be exercised only where the necessity is evident (and pursuant to a narrowly drawn statute). Most importantly, "the governmental interest must be unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedom can be no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien,* 391 U. S. 367 (1968).

The reasoning of the Kentucky Court in upholding the conviction of the present appellants would not satisfy these requirements. Whenever a university official, for whatever reason, decided that students should not be in a particular place, he could order them to leave, "since their privilege to use and occupy the property of a school should be subject to the will of its governing authorities." If a group of students were given permission to conduct a meeting in a particular room, and during the meeting the students criticized American foreign policy, presumably a univeristy official could order them to leave, and if they failed to do so, they could be convicted of a breach of the peace. The University's control of its space would thus entitle it to license expression therein. Cf. *Marsh* v. *Alabama, supra.*

In the case at bar the legitimate interest of the university officials was in preventing tangible interference with the recruiting that was going on in the building.

No such tangible interference occurred, either by the presence of the protestors on the second floor, or by the presence of the appellants in the alcove after the other protestors were ordered to leave. As admitted by the Court of Appeals, the entire nature of the protest had been non-violent, and it was not reasonable to anticipate that violence would suddenly occur. At the time that the four appellants were ordered to leave, it could not be said that they would have physically interferred with the recruiting or have engaged in improper conduct. Perhaps their presence there and their sitting in "silent reproachment" would have succeeded in dissuading other students from being recruited by the D.I.A., but a peaceful sit-in, like peaceful picketing, does not lose its constitutional protection because people might be dissuaded from dealing with the object of the protect. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). There was no hostile crowd of opponents, if that were relevant. Cf. *Brown* v. *Louisiana*, 383 U. S. 131, 133 note 1 (1966). In the circumstances of the case at bar, the university officials had no legitimate interest in requiring the appellants to abandon their sit-in at the time the order to leave was given, just as they had no legitimate interest in banning all the protestors from the second floor.

More significantly, there is evidence in the record which shows rather conclusively that the purpose of the officials in ordering the protestors to leave the second floor and the appellants to leave the alcove was directly related to the suppression of free expression, namely that the students were ordered to leave, because

the D.I.A. insisted on this as a condition for their continued recruiting. Where speech and non-speech elements are combined in the same course of conduct, as in the case of a sit-in, the governmental interest in regulating that conduct must be unrelated to the suppression of free expression. *United States* v. *O'Brien, supra.* Where governmental regulation has been upheld, as in *Adderley* v. *Florida, supra,* this Court pointed out that "There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." 385 U. S. at 47.

In the case at bar, however, the record reveals that the demonstrators were ordered to leave the second floor and the appellants to leave the alcove precisely because the D.I.A. objected to the protest and because the university officials wished to accommodate the D.I.A. Assistant Dean Brandenburg stated this quite explicitly:

> "The recruiters [from D.I.A.] came in and talked with Dean Hall regarding what conditions would have to be met in order for them to stay . . .
>
> "Mr. Hall stated to this group [the protestors] that a point in time has been reached where their presence was constituting an interference and interruption of the University Placement Service Activities, and he asked them to remove themselves either to the lobby area on the first floor—the Placement Service is on the second floor—He

> asked them to remove themselves either to the general or the public lobby area on the first floor or to the outside of the building, either place they chose, but that the circumstances at that point made it necessary for him to ask them to remove themselves because they were interfering with the operation of the Placement Service" (R. 59-61).

The "circumstances" making it necessary for him to ask them to remove themselves were the demands by the D.I.A. that they not be permitted to make their protest at the site of the recruiting. The "interference" with the operation of the Placement Service was that the D.I.A. refused to hold the interviews if the protestors were present on the second floor. The appellants were ordered to leave, and punished for their refusal, in a clear effort to suppress the expression in which they were engaged.

At the time the appellants were arrested and charged with the offense of breach of the peace, the protest remained orderly and non-violent. The appellants had not laid hands on anybody and were not attempting to interfere with the recruiting operations by anything other than their physical presence at the site of the recruiting. The second floor of the building, where the offices of the Placement Service were housed, was, as it normally is, open to the public. The only justification for upholding the conviction that the Court of Appeals has advanced was that the building was like private property and the appellants could be ordered to leave at the will of the university authorities. While the state, "no less than a private owner of

property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida, supra,* it may not exercise this power for the purpose of suppressing free expression. This is what occurred in the case at bar.

The appellants have been convicted solely for engaging in constitutionally-protected acts of expression. Since no legitimate interest of the state was impaired by their engaging in such acts, the conviction cannot stand.

C. The Appellants Have Been Deprived of Due Process of Law in Violation of the Fourteenth Amendment in That the Record Is Totally Devoid of Evidence to Support a Conviction for Breach of the Peace, and That, in Effect, the Appellants Were Convicted of the Offense of Trespass, for Which They Were Not Charged.

Throughout the proceedings in the state courts the appellants have contended that their sitting in the alcove and refusing to leave when ordered did not constitute a breach of the peace under Kentucky law. The contention of the appellants, as stated by the Kentucky Court of Appeals, was "that the evidence cannot support a conviction for breach of the peace under any set of instructions." 441 S. W. 2d at 158.

This the Court of Appeals rejected, although as it also stated, "During the time they were present in the alcove they [the appellants] did not raise their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not directly prevent anyone from entering any of the rooms." 441 S. W. 2d at 153.

The appellants argued that convictions for breach of the peace had been sustained by the Kentucky Court of Appeals only in the following situations: (1) the commission of an overt act of violence, see *Smith* v. *Commonwealth*, 102 Ky. 546, 257 S. W. 720 (1924); (2) the commission of obscene or indecent conduct, see *Hines* v. *Commonwealth*, 308 Ky. 859, 215 S. W. 2d 1014 (1948); and (3) the use of obscene or "fighting words," likely to provoke retaliation, see *Delk* v. *Commonwealth*, 166 Ky. 39, 178 S. W. 1129 (1915). The Court of Appeals did not dispute this argument, but observed that "as in the instance of murder and other common law crimes, it may be committed in new ways if they fall within the interdict of the old principles." 441 S. W. 2d at 154.

However, in holding that the conduct of the appellants amounted to a breach of the peace, the Court predicated its decision on the fact that they failed to obey an order of university officials to leave the premises, and that as of that time they were *trespassers*. The Court stated:

> "The privilege of an enrolled student to use and occupy the property of a school is and should be subject to the will of its governing authorities. If he is told to stay out of a particular room, building or familiar trysting place, he enters it as a trespasser. Likewise, if he is directed to leave it he remains as a trespasser." 441 S. W. 2d at 157.

The appellants were convicted of the offense of breach of the peace, because in the view of the Kentucky Court of Appeals, they had become trespassers on university

property and had refused to comply with an order to disperse.

At the time of the sit-in, there was no failure to disperse statute in Kentucky, as there is now. See KRS 437.014. There has never been a general criminal trespass statute, although certain specific acts such as trespassing on railroad property are criminally interdicted. See *e. g.*, KRS 433.395. However, in the case of trespass to the public property of the state, such as a university, a specific sanction *is* provided, but it takes the form of a civil proceeding in which a fine may be assessed by the jury . See KRS 56.010, 433.490. Trespass is also a common law offense, see *State* v. *Tyndall*, 192 N. C. 559, 135 S. E. 451 (1926), and in Kentucky persons may be prosecuted for common law offenses not otherwise prescribed by statute. See *Gibson* v. *Commonwealth*, Ky., 328 S. W. 2d 162 (1959); *Ashton* v. *Commonwealth*, Ky., 405 S. W. 2d 562 (1965), rev'd., 384 U. S. 195 (1966). Punishment for such offenses is specifically provided. KRS 431.075.

Appellants were not charged with the common law offense of trespass, nor did the state pursue the civil remedy for trespass against state property. Instead appellants were charged with the offense of breach of the peace. The record is totally devoid of evidence to support a conviction for breach of the peace as that offense has generally been defined in Kentucky and elsewhere. *The only evidence relied on to support the conviction for breach of the peace is that the appellants were trespassers.* A conviction totally devoid of evidentiary support is violative of due process of law.

Thompson v. *City of Louisville*, 362 U. S. 199 (1962); *Garner* v. *Louisiana*, 368 U. S. 248 (1961); *Gregory* v. *City of Chicago*, ——— U. S. ———, 89 S. Ct. 946 (1969). Moreover, this Court may find that the conviction was totally devoid of evidentiary support, even though the highest court of the state has held that the evidence was sufficient. *Gregory* v. *City of Chicago, supra.* It is irrelevant, of course, that the evidence in the case at bar might prove the commission of the offense of trespass, for "It is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as is to convict him upon a charge for which there is no evidence to support that conviction." *Gregory* v. *City of Chicago, supra; Garner* v. *Louisiana, supra; Cole* v. *Arkansas*, 333 U. S. 196 (1948). There was no evidence to support the conviction of the appellants for breach of the peace except for the fact that in the view of the Kentucky Court of Appeals, they were trespassers. Since they were charged with breach of the peace and not trespass, a conviction for breach of the peace in these circumstances cannot be sustained. The facts in the case at bar are very similar to those in *Garner* v. *Louisiana, supra*, and the same result should obtain.

In an effort to sustain the conviction of the present petitioners, the Kentucky Court of Appeals has attempted to equate their "trespass" with a breach of the peace, stating "that an entry without actual force, although against the will of the owner, with a purpose expressed at the time when obtaining the possession not to surrender it, is a breach of the peace was estab-

lished in this state as long ago as 1884." It cites the case of *Johnson* v. *Clem*, 82 Ky. 84 (1884), in support of this proposition. In that case, however, the right of the trespasser to be on the land had terminated *prior to the time of the entry in question*, one of the members of the trespassing party carried a gun, and the trespassers stated that they would hold the land by violence if necessary. And, unlike the case at bar, the original entry was against the will of the owner. The "rule," as stated by the Court of Appeals in that case was that: "Where one is in possession of his own land and another with himself and hands enters thereon, against the will of the owner, and when requested to leave, by violent and abusive language announces his purpose to hold the possession, the entry and holding is forcible, and constitutes a breach of the peace." 82 Ky. at 86. That case is certainly not authority for the proposition that the conduct of the present appellants constituted a breach of the peace.

Finally, the Kentucky Court of Appeals states that the presence of the appellants constituted a breach of the peace because it "invited the owner to eject the intruder by force." Under this reasoning any trespass, even if totally non-violent, as in the case of the present appellants, necessarily amounts to a breach of the peace, because it incites the owner of the property to resort to violence. If every trespass necessarily amounted to a breach of the peace, it is strange that these were separate offenses at common law, and that the Kentucky legislature felt the necessity of making trespass a distinct offense. It is also strange that the Ken-

tucky Court, which has previously held that every act of disorderly conduct did not constitute a breach of the peace, see *City of Mt. Sterling* v. *Holly*, 108 Ky. 621, 57 S. W. 621 (1900); *City of Pineville* v. *Marshall*, 222 Ky. 4, 299 S. W. 1072 (1927), now implies that every act of trespass does.

There is no evidence to support the conviction of the present appellants for the offense of breach of the peace except for the fact that in the view of the Kentucky Court the appellants were trespassers on private property. Any attempt to assimilate this non-violent trespass to the offense of breach of the peace is plainly transparent. The appellants were denied due process of law in that their convictions for breach of the peace were totally devoid of evidentiary support and in that they were convicted of the offense of trespass, for which they were not charged.

CONCLUSION.

For the reasons aforesaid, it is submitted that the Court should note probable jurisdiction upon the appeal filed herein.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of Kentucky, May 9, 1969, 441 S. W. 2d 150

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PALMORE, Judge.

This is an appeal from a conviction for breach of the peace, KRS 437.010, entered by the Fayette Circuit Court on February 6, 1968. On November 6, 1967, the Defense Intelligence Agency (D.I.A.) and other prospective employers recruiting employees from among the student body of the University of Kentucky were holding interviews on the second floor of the Old Agricultural Building in the Placement Service hallway. The appellants and other regularly enrolled students of the university undertook to protest against D.I.A.'s presence on the university campus.

In the morning Associate Dean of Students Jack Hall met with the group of student protestors and established certain ground rules, which were: (1) peaceful picketing would be permitted; (2) noise would have to be maintained at a level where all could operate; and (3) access would have to be available to the people going to Placement Service rooms.

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Between 9:30 A.M. and 1:00 P.M., during which time one or more of its number were passing out leaflets, the protesting group increased from some five students to approximately 17 students and five members of the press. Between 1:00 and 1:30 P.M., after conferring with the intervening representatives, Dean Hall determined that "we were unable to continue the operation of the Placement Service with any amount of normality" and asked the students to move to the public lobby area on the first floor of the building or outside the building. At this time all of the students and press

representatives left the second floor with the exception of the four appellants.

The appellants were standing in the entrance to the alcove which led to three rooms, two of which were to be used at 1:30 P.M. by the D.I.A. They refused a second request to leave and, instead, moved inside the alcove and sat down on the floor, "blocking the doorways to the two rooms that were to be used at 1:30" by D.I.A. At that point Dean Hall called the campus police, who came to the area and again asked the appellants to leave, at the same time advising them that if they did not leave they would be arrested and charged with breach of the peace. When the appellants still refused to leave they were arrested by the campus police and physically carried down the stairs and out of the building into the campus police cruiser. The appellants did not offer any resistance except that they declined to move under their own power, thus requiring the arresting officers to transport them bodily from the premises.

During the time they were present in the alcove they did not raise their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not directly prevent anyone from entering any of the rooms. This was equally true of their conduct throughout the day. For a time in the morning appellant Lewis lay prone across a doorway in the alcove, thereby forcing people on several occasions to step over her, but this tactic did not actually succeed in preventing anyone from entering the area. At one point in the morning appellant Woock raised his voice in a discussion, but he lowered it following an admonition by Dean Hall. He also moved when the dean told him that he was blocking the alcove area. In the afternoon, before the dean ordered the students to leave the second floor, a secretary sought to enter the alcove and some students, including appellants Woock and Lewis, were blocking her, but after being requested to do so they let her pass. Their

"interest was not in blocking her," so they stated, "but in blocking the Defense Intelligence Agency."

After conviction of the appellants in the Lexington Police Court for breach of the peace an appeal was taken to Fayette Circuit Court. A motion to dismiss based on the unconstitutionality of KRS 437.010 under the First and Fourteenth Amendments to the Constitution of the United States and sections 1 and 8 of the Constitution of Kentucky was overruled, and the case proceeded to trial before a jury. At the conclusion of all the evidence appellants moved for a directed verdict, which also was denied. The jury returned a verdict of guilty and fixed the punishment of each appellant at a fine of $75. Judgment was entered pursuant to the verdict.

The crucial instructions given by the trial court to the jury were as follows:

> "Instruction No. 1
>
> "If the jury believe from the evidence in this case beyond a reasonable doubt that the defendants, Khristina Lewis, Dan Sheridan O'Leary, William Murrell and Roger A. Woock, in Fayette County, Kentucky, and within 12 months next before the issuance of the warrant herein, did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky by blocking the entrance to the Placement Service, you will find the defendants guilty as charged in the warrant, and fix their punishment at a
>
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>
> fine of not more than $100.00 or imprisonment in the county jail for not less than five nor more than fifty days, or by both such fine and imprisonment, in your discretion.

"Instruction No. 2

"A breach of the peace is a violation of public order or decorum; the offense of disturbing the public peace. By 'peace' is meant the tranquility enjoyed by the citizens of the community, where good order reigns among its members."

We do not pass on the correctness of these instructions, because they were given without objection and were not challenged by a motion for new trial. Cf. *Hartsock* v. *Commonwealth*, Ky., 382 SW 2d 861 (1964); Stanley's Instructions to Juries, §797 (1967 Supp.). Therefore, whether appellants could validly be convicted of breach of peace under the facts of the case must be considered in terms of the offense as defined by law vis-a-vis the instructions. And in this particular, it is our opinion that the conduct of the appellants could have amounted to a breach of peace only after their right to be present at the time and place in question had been terminated.

The appellants make two basic arguments, one of which is that the law of breach of peace in this state is void because it is unconstitutionally vague and the other is that, if not void, it cannot apply to the exercise or attempted exercise of a First Amendment right because such activities can be prohibited or regulated only by a narrowly drawn law specifically delineating the circumstances and standards under which they are not allowable.

Breach of peace is a common law offense, the punishment for which is prescribed by statute. *Delk* v. *Commonwealth*, 166 Ky. 39, 178 SW 1129, 1131 (1915). Appellants seem to feel that its application is confined to the types of fact situations that have been the subject of appeals to this court, but we perceive no reason why that should be so. As in the instance of murder and other common law crimes it may be committed in new ways if they fall within the interdict of the old principles.

"The term 'breach of peace' is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the law affords every citizen, or acts such as tend to excite violent resentment." *Kina* v. *Commonwealth*, 32 KLR 80, 105 SW 419 (1907). To paraphrase the last portion of this quotation, conduct that is calculated to incite violence is a breach of peace. "It includes not only violent acts but acts and words likely to produce violence in others." *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940). However, the literal breadth of the definition does not mean, and in this jurisdiction never has been construed to mean, that lawful and proper conduct may constitute a breach of peace just because it provokes violence or disorder. To the contrary, it was explicitly recognized in *West* v. *Commonwealth*, 208 Ky. 735, 271 SW 1079, 1081 (1925), that the lawful exercise of a constitutional right (the right of assembly) cannot be a breach of peace. We therefore do not feel that the law against breach of peace, as it has been thus construed in Kentucky, is so vague or [illegible]erly broad in scope as to pose any threat to the rights of free speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. Cf. *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965). Indeed, it occurs to us that if there is any uncertainty in this context, it is not because the tried and settled law of breach of peace is vague, but because the burgeoning scope of the constitutional protections has become so.

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In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Supreme Court invalidated convictions for common law breach of peace which had been held valid by state courts. The same result was reached in *Terminiello* v. *Chicago*, 337

U.S. 1 (1948), and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), with respect to statutory offenses. In each case the highest court of the state had construed the offense to include constitutionally protected conduct. Our law of breach of peace has never been so construed, and we do not so construe it now. In *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965), and, apparently, *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), it was held that a conviction under an overly-broad law, whether statutory or judge-made, cannot be sustained by a limiting or narrowing construction placed upon the law for the first time in the particular case at hand. We repeat, however, that the law of breach of peace in this Commonwealth does not need to be whittled and trimmed to meet this case. We construe *West* v. *Commonwealth*, 208 Ky. 735, 271 SW 1079, 1081 (1925), as a clear indication that the law against breach of peace did not then and does not now prohibit constitutionally protected conduct.

It is important, we believe, to bear in mind that a decision concerning the applicability of a law to a factual situation which has not come before the court in the past does not amount to the making of a new law. And "it is firmly established that a criminal law is not unconstitutional merely because it throws upon people the risk of rightly estimating a matter of degree which deals with fixed and actual, as distinguished from imaginary and unascertained, conditions." *Bailey* v. *Commonwealth*, 235 Ky. 173, 30 SW 2d 879, 880 (1930).[1] See also *Arlan's Department Store of Louisville* v. *Commonwealth*, 269 SW 2d 9, 11 (1963),[2] and cases therein cited.

There are many crimes that are and must be broadly defined, but which are not rendered invalid by the fact that

[1] Sustaining conviction of laundry owner under statute requiring employer to provide "suitable and proper washrooms and water closets" for female employes.

[2] Upholding "work of necessity" exception to Sunday Closing Law.

the definitions do not specify every conceivable exculpatory circumstance. That the law against breach of peace as it has been construed in this state makes due allowance for the exercise of constitutional rights has been noted above. It has been likewise construed to allow other defenses. For example, in *Hines* v. *Commonwealth*, 308 Ky. 859, 215 SW 2d 1014 (1948), the defendant was convicted of breach of peace for having indecently exposed his person in public. His excuse was that he had been stricken with a sudden physical emergency and had to remove some of his clothing in order to apply a palliative treatment to the affected area. In reversing with directions that a defensive instruction be given, the court commented as follows: "To illustrate, a person may be struck by an auto and in getting at his injury he may tear off some of his clothing so as to cause an exposure of his person. We do not suppose it would be contended that his intent or motive had nothing to do with the act. In cases like the present regard must be had for the infirmity of the flesh and frailty of human nature. This man was confronted with an emergency, according to his testimony, and he believed he had removed himself from public view. At least that was his own defense. It is like self-defense where one is attacked by another person." 215 SW 2d 1015, 1916.

We are certain it never occurred to the members of the court in 1948 that they were constricting or changing the law.

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They assumed that the most stable and enduring ingredient of the law is common sense, under which the same result would have been reached under existing principles at any prior time had a similar occasion presented itself.

The opinion of the Supreme Court in *Ashton* v. *Kentucky*, 384 U.S. 195, 200-201 (1966), contains the following passage: "Vague laws in any area suffer a constitutional

infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. We said in *Cantwell v. Connecticut* that such a law must be 'narrowly drawn to prevent the supposed evil' and that a conviction for an utterance 'based on a common law concept of the most general and undefined nature' could not stand. Taken out of context, this statement might lead one to the conclusion that a common law conception of breach of peace cannot survive in the current constitutional atmosphere. That is not, however, what the court actually said in *Cantwell*. What the court there said was, in substance, that conduct *which is constitutionally protected* cannot be limited or regulated "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." 310 U.S. at 311. Neither in *Cantwell* nor in any other decision that has been brought to our attention has the Supreme Court held that the common law crime of breach of peace has been put to death by the Constitution. One remark in *Ashton v. Commonwealth*, Ky., 405 S.W. 2d 565, 567 (1966), to the effect that "the ancient broad common law concept of what constituted a 'breach of peace' is no longer a constitutional basis for imposing criminal liability" was itself an overly broad statement and is not to be taken to mean that we have no law against breach of the peace in this state.

Appellants contend that if the law is not void for vagueness, nevertheless it cannot be applied to any attempt to exercise First Amendment rights. We cannot go that far. As properly construed, it does not prohibit the lawful exercise of any constitutional right. A person who desires to exercise his rights need not be concerned about defining the law against breach of peace. All he needs to do is to understand and stay within the limits of the right he wants

to exercise. He cannot reasonably expect all and sundry to run for cover while he attempts to see how far into orbit he can shoot his own notions of right and wrong. We are fond, in this country, of reiterating the principle that even the greatest majority is powerless to throttle a constitutional right. It is equally true, however, that the existence of a constitutional right is neither a sword to cut up the rights of others nor a shield against the consequences of conduct that otherwise violates the law. The majority too has rights, not the least of which is the protection afforded by its criminal laws.

It is clear from the decisions of the Supreme Court, some of which are mentioned above, that free speech and the right of assembly in public places must not be left to the *ad hoc* discretion of provincial authorities, nor can people be ordered off the premises of business establishments, otherwise open to the public, for no reason except their creed or color. There is a difference, however, between public and private places, and in this context we regard the premises of a college or university as no different from private property. That the institution is financed with tax money is no reason why its governing body should not have the same dominion and control over it as would a private owner. No one would contend, we trust, that the presence of a group of demonstrators in the office of its president would be any more legitimated and protected by the Constitution that would be their presence in the White House at Washington.

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"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U. S. 47 (1966). Surely this must be true with reference to premises that are not, like streets, parks and playgrounds, maintained for use by the public in general.

The privilege of an enrolled student to use and occupy the property of a school is and should be subject to the will of its governing authorities. If he is told to stay out of a particular room, building, or familiar trysting place he enters it as a trespasser. Likewise, if he is directed to leave it he remains as a trespasser. Here, the appellants entered the area in question by lawful permission, implied if not express, and albeit their acts and conduct were not illegal, and not a breach of peace, they were in a place from which the university had the right to exclude them. Their conduct in remaining thus assigned a different cast and significance after they had been asked to leave. They knew then that they were in a place they had no right to be.

It is our decided opinion that the right of free speech, or of assembly, or of petition, does not carry a passport to exercise it in a place where the person who would exercise it knows full well he has no right or license to be. We are equally convinced that to require a special "narrowly drawn law" so that he may be forewarned and certain of that which ought to be obvious to the merest child would be utterly absurd and put an affront to the general citizenry of the country.

We find ourselves in agreement with the sentiments expressed by Mr. Justice Black in his dissent from the majority opinion in *Brooks v. Louisiana*, 383 U.S. 131 (1965):

> "It is high time to challenge the assumption on which too many people have too long acquiesced, that groups that think they have been mistreated or that actually have been mistreated have a constitutional right to use the public's streets, buildings and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb. Invasion of another man's property over his protest is one of the surest steps any person can pick out to disturb the peace. Though the First

> Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."

We hold that in this state, and to the extent of our power to say it, (1) the sanctity of a college campus and buildings is no less than that of private property, and (2) an exercise or attempt to exercise rights otherwise guaranteed by the First Amendment is not "protected" in the sense that, absent a regulation or statute specifically designed in advance to meet the narrow details of the event, it insulates the speaker or participant from the legal consequences of his presence or actions upon property which he knows or should know he has no right or permission to be.

That "an entry, without actual force, although against the will of the owner, with a purpose expressed at the time when obtaining the possession not to surrender it," is a breach of peace was established in this state as long ago as 1894. [illegible] 81 Ky. 291, 293 (1884). The obvious result is that such an entry challenges the owner to exercise his ancient right to repel it by force. By the same reasoning a refusal to leave the property though lawfully and peacefully entered in the first instance, invites the owner to eject the intruder by force. Force is violence. The laying on of hands to move a person against his will is violence. As a

matter of fact, if the arrests in this instance were not lawful the actions of the police constituted an assault and battery upon the appellants. Willful provocation of what would otherwise amount to assault and battery certainly is a breach of the peace.

Johnson v. *Olson*, the last cited case, held that a refusal to leave upon request, accompanied by violent and abusive language announcing the purpose to hold possession, was a breach of peace. We think the same result must follow in this case. The increment of force and violence implicit in a refusal to move upon rightful order of the owner or custodian of property does not depend on the amount of noise being made or not made by the trespasser. It is our conclusion that the actions of the appellants authorized their conviction for a breach of the peace.

We do not consider it to be of any legal significance that the appellants were but four in number and had remained in the posture of trespassers for only a few minutes before they were arrested. The dean's right to clear the area necessarily extended to each and all of the persons to whom his order was directed, and if it had not been enforceable immediately they most certainly would have remained there until they had succeeded in disrupting the lawful activities of those to whom the space has been assigned.

Earlier in this opinion we mentioned that the instructions may not have been correct, but that they were given without objection. Whether the evidence justified a conviction under the instructions actually given is not an issue in this case, and the appellants have not sought to make it one. In effect, their contention is that the evidence cannot support a conviction for breach of peace under any set of instructions. That is the argument this opinion answers in the negative.

The judgment is affirmed.

All concur.

APPENDIX B

Mandate of the Court of Appeals of Kentucky, June 10, 1969

THE COMMONWEALTH OF KENTUCKY
THE COURT OF APPEALS
Spring Term—May 9, 1969

MANDATE

Dee Simmons—(Leroy III)

Appeal from a judgment of the Fayette Circuit Court

Commonwealth of Kentucky

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A Copy. Attest:

By ——

Issued June 10, 1969

APPENDIX C

Notice of Appeal to the Supreme Court of the United States, June 27, 1969

THE COURT OF APPEALS OF KENTUCKY
No. 8-118-68

Dan Sheridan O'Leary, III, Et Al., *Appellants,*

Commonwealth of Kentucky, *Appellee.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Dan Sheridan O'Leary, III, William Mizrell, Khristina Lewis and Roger A. Wenck, appellants herein, hereby appeal to the Supreme Court of the United States from the final order of this Court entered on June 10, 1969, affirming their judgments of conviction.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

The appellants were convicted of the crime of breach of the peace, in violation of KRS 437.010, and each appellant was sentenced to pay a fine of $75. Each appellant is presently enlarged on bail, having given security for the payment of his fine.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings.

III. The following questions are presented by the appeal:

A Whether KRS 437.010 is unconstitutional on its face, as vague and overbroad in violation of the First and Fourteenth Amendments to the Constitution of the United States.

B Whether the application of KRS 437.010 to the appellants in the case at bar violates the First and Fourteenth Amendments to the Constitution of the United States in that the appellants have been convicted solely for engaging in protected acts of expression.

C Whether the appellants have been deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the record is totally devoid of evidence to support a conviction for breach of the peace, and that, in effect, the appellants were convicted of the offense of trespass, for which they were not charged.

Robert Allen Sedler,
3461 Keithshire Way,
Lexington, Kentucky 40503

Roger B. Slodd,
1304 First National Bank Building,
Lexington, Kentucky 40507

By

Attorneys for Appellants

June 2, 1969

Office Supreme Court, U.S.
FILED
OCT 16 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 526, October Term, 1969

JOAN SHERIDAN O'LEARY, ET AL — APPELLANTS

v.

COMMONWEALTH OF KENTUCKY — APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF KENTUCKY

MOTION TO DISMISS AND/OR AFFIRM
AND BRIEF IN SUPPORT

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

GEORGE F. BABE
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Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE

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IN THE

Supreme Court of the United States

No. 526, October Term, 1969

DAN SHERIDAN O'LEARY, III, ET AL.----------*Appellants*

V.

COMMONWEALTH OF KENTUCKY ----------*Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that this appeal be dismissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this motion states:

1. The appeal is not properly taken in conformity to the statute governing the appellate jurisdiction of this Court because the appeal does not involve a statute of the State within the meaning of 28 U.S.C. § 1257 (2).

2. The contention that the convictions are so devoid of evidentiary support as to constitute a denial of due process was neither raised nor decided in the state courts.

3. All three questions presented by appellants are not substantial Federal questions under the circumstances of this case. Appellants were not engaging in protected conduct and may not rely on the theory of overbreadth.

4. Brief in support of these motions is filed herewith pursuant to Rule 35.

Respectfully submitted,
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IN THE

Supreme Court of the United States

No. 526, October Term, 1969

DAN SHERIDAN O'LEARY, III, ET AL.----------*Appellants*

V.

COMMONWEALTH OF KENTUCKY ----------*Appellee*

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969).

JURISDICTION

Appellee contends appellants improperly invoke the appellate jurisdiction of this Court under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

I.

Whether the upholding of a state common law offense, the punishment of which is prescribed by statute, as against constitutional objections, presents a case within the appellate jurisdiction of this Court.

II.

Whether this Court has jurisdiction over the question of absence of any evidence to convict, the question not having been raised or decided in state courts.

III.

Whether in this case, in which appellants were convicted of the Kentucky common law offense of breach of peace for willfully and intentionally blocking doorways to an office of the University of Kentucky, the questions of (1) vagueness and overbreadth of the law, (2) unconstitutionality of application of breach of peace law to facts of this case on freedom of speech grounds, and (3) absence of evidence to support conviction, are substantial.

STATEMENT

The four appellants were convicted, after trial by jury, of the Kentucky common law offense of breach of peace, and fined $75.00 each. (Transcript of Record, hereafter TR, pp. 7, 8). The circumstances giving rise to these appeals follow.

On November 6, 1967, the four appellants, who were students, participated in a demonstration protesting against the Defense Intelligence Agency which was recruiting on the University of Kentucky campus. (Transcript of Evidence, hereafter TE, pp. 4-11). The demonstration took place in the hallway outside the Placement Service offices (where the recruiting activities were taking place) on the second floor of the Old Agricultural Building on the campus (TE 4).

Between 9:30 A.M. and 10:00 A.M. that morning, Associate Dean of Students Jack Hall met with the group of student protestors and established certain ground rules which were: (1) peaceful picketing would be permitted; (2) noise would have to be maintained at a level where all could operate; and (3) access would have to be available to the people going to Placement Services rooms. (TE 6).

At one point during the morning one of the appellants, Khristina Lewis, lay prone on the floor directly in front of the entrance into an alcove containing three offices used by the Defense In-

telligence Agency (TE 5-7), and it was necessary for those entering the alcove to step over her (TE 36). Two of the appellants, Woock and Lewis, prevented a secretary of the Placement Service from entering one of the offices in the alcove. After a request by Associate Dean of Students Jack Hall, they let her pass (TE 21). The interest of "the people in the door . . . was not in blocking her, so they stated, but in blocking the Defense Intelligence Agency." (TE 21). On at least one occasion there "was some profanity used," although this was not specifically attributed to any of the appellants. (TE 35).

The group grew from approximately 5 students at 9:30 A.M. (TE 4) to approximately 17 students and 5 members of the press by 1:00 P.M. (TE 30). Between 1:00 and 1:30 P.M., Dean Hall advised the demonstrators that a point had been reached where they were constituting an interference and interruption of the University Placement Service activities, and asked them to remove themselves either to the general or public lobby area on the first floor or to the outside of the building, either place they chose. (TE 30, 31). The press and all of the demonstrators except the four appellants left the second floor, but the appellants continued to stand in the entrance to the alcove leading to the offices. (TE 8, 9). When Dean Hall again asked them to leave, appellants moved inside the small alcove and sat down, blocking doorways to two rooms that were to be used at 1:30 that afternoon by the Defense Intelligence Agency. He then called the University Police and asked them that they request appellants to leave the second floor. (TE 8, 9, 46).

The testimony of Sergeant Best of the University Police describes what occurred when the officers arrived:

"D10 All right, sir, and what took place after you arrived?

A. Well, I asked them twice, on two different occasions while I was up there if they would get up and get outside or get up and move, and I asked them once and they refused, and I asked them

twice, and then I advised them if they didn't, I would have to arrest them and charge them with breach of the peace, and that's what I done.

D11 On either occasion that you asked them to leave did they make any response to you?

A. No, sir. They didn't get up, no sir.

D12 Well, did they answer you? Did they say anything to you?

A. They just wouldn't get up. I don't recall saying, but they wouldn't get up.

D13 Now, were you by yourself on this occasion?

A. No, sir, there was Sgt. Curtis with me.

D14 And where did you take them after placing them under arrest?

A. We carried them down the steps and put them in the cruiser, and they was taken to city police station, lockup.

D15 Now, you say you carried them down the steps?

A. Yes, sir.

D16 Describe how this was done and for what reason?

A. Well, like I say, they . . .

MR. SLEDD: Objection,

THE COURT: Overruled.

D17 Go ahead and answer.

A. We asked them, when they wouldn't get up, we asked them, and when they wouldn't we got them under each arm, me and Sgt. Curtis, and carried them down the steps one at a time and put them in the cruiser.

D18 Was that all four of them that this happened with reference to?

A. Yes, sir. I don't think that I carried—I think Capt. Sloan and somebody carried the lady down, but we carried the three boys down." (TE 38-40)

Appellants were convicted of breach of peace in the Lexington Police Court. (TR 2). They appealed to the Fayette Circuit Court for a trial de novo before a jury. (TR 1-7). At the conclusion of the evidence summarized above, the trial court instructed on breach of peace as follows:

"INSTRUCTION NO. 1

If the jury believe from the evidence in this case beyond a reasonable doubt that the defendants, Khristina Lewis, Dan Sheridan O'Leary, William Murrell and Roger A. Woock, in Fayette County, Kentucky, and within 12 months next before the issuance of the warrant herein, did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky, by blocking the entrance to the Placement Service, you will find the defendants guilty as charged in the warrant and fix their punishment at a fine of not more than one hundred dollars or by imprisonment in the county jail for not less than five nor more than 30 days, or by both such fine and imprisonment in your discretion.

INSTRUCTION No. 2

A 'breach of the peace' is a violation of public order or decorum, the offense of disturbing the public peace. By 'peace' is meant the tranquility and joy by the citizens of the community where good order reigns among its members." (TE 69, 70).

The jury found appellants guilty of breach of peace and fined each $75.00. Judgment was entered accordingly, the Kentucky Court of Appeals affirmed, *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969), and these appeals followed.

SUMMARY OF ARGUMENT

This case is not within the appellate jurisdiction of this Court because the law appellants challenge constitutionally is not statutory but common law.

The contention that the convictions are so devoid of evidentiary support as to constitute a denial of due process was neither raised nor decided in the state courts; there is such an abundance of evidence as to render that question unsubstantial.

All three questions presented, constitutionality of the law on its face, constitutionality as applied, and evidence to convict, are not substantial Federal questions under the circumstances of this case. Appellants were not engaging in protected conduct and may not challenge the law for overbreadth; it is not overly broad anyway.

ARGUMENT

I.

THERE IS NO APPELLATE JURISDICTION AS THE LAW CHALLENGED IS COMMON LAW, AND NOT A STATUTE WITHIN THE MEANING OF 28 U.S.C. § 1257 (2).

Kentucky Revised Statute 437.010 (now repealed, Kentucky Acts, 1968, c. 103, § 3) simply provides:

> "Any person who is guilty of a breach of the peace, riot, rout, unlawful assembly or affray shall be fined not more than one hundred dollars or imprisoned for not less than five nor more than fifty days, or both."

Thus, breach of peace is not a statutory offense in Kentucky; it is a common law offense, the punishment for which is prescribed by statute. *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969); *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915).

The phrase "statute of any state" in what is now 28 U.S.C.

§ 1257 (2), conferring appellate jurisdiction, has been broadly construed by this Court, and includes statutes, municipal ordinances, and administrative enactments. See *King Mfg. Co. v. Augusta*, 277 U.S. 100 (1928), and cases cited therein. However, no case has come to our attention where a common law offense was considered to be included. On the other hand, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court, while exercising appellate jurisdiction over a conviction under a state statute, considered a concurrent attack on the Connecticut common law offense of inciting a breach of the peace as coming within the certiorari jurisdiction of the Court. 310 U.S. at 300, 301.

Kentucky Revised Statute 437.010 merely prescribes the maximum penalty for breach of peace and several other common law offenses. Since the penalty is not attacked, and the offense is defined by Kentucky common law, there is no basis for exercise of the appellate jurisdiction of this Court.

II.

THE CLAIM OF TOTAL ABSENCE OF EVIDENCE TO SUPPORT THE CONVICTIONS WAS NEITHER RAISED NOR DECIDED IN THE STATE COURTS AND IS NOT PROPERLY BEFORE THIS COURT.

In the trial court, appellants simply moved for a directed verdict on the ground the Commonwealth "failed to prove the necessary elements to make out the offense as charged." (TE 68-9). We find nothing in the brief of appellants in the Kentucky Court of Appeals or in the opinion indicating the claim of absolute absence of evidence to convict was raised or decided. Accordingly, the point is not properly before this Court for decision. *Edelman v. California*, 344 U.S. 357 (1953); *Maxwell v. Newbold*, 59 U.S. 511 (1856); Annotations, 84 L.ed. 925, 927 (1940), and 100 L.ed. 1200 (1956).

We should note, however, that in any event we have difficulty distinguishing this point, as it is presented by appellants.

from the claim that the application of the common law offense to the facts of this case is unconstitutional.

III.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

(1) APPELLANTS MAY NOT CHALLENGE THE COMMON LAW OFFENSE FOR OVERBREADTH; IT IS NEITHER VAGUE NOR OVERLY BROAD.

We believe it appropriate at this point to recap the facts upon which the United States Constitution is to be brought to bear. When politely requested to remove to another part of the building or outside, appellants entrenched themselves in the small alcove leading to the University Placement Service, and sat down, blocking two doorways. The campus police were called, and they twice asked appellants to move, expressly stating they would otherwise have to arrest appellants for breach of the peace. Appellants adamantly remained to carry out their avowed purpose of blocking the Agency. They were not satisfied to demonstrate and disseminate their ideas as they were permitted to do. Instead they chose to carry them into effect through the forceful means of blocking ingress and egress of law abiding persons who had a right to come and go in accordance with their own ideas. It is difficult to conceive of a more flagrant violation of the peace. And no question of actual notice is presented because appellants were expressly told they were to be arrested and what for.

Appellants were convicted *not* because they were engaging in speech or disseminating ideas, but because the jury found beyond a reasonable doubt they "did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky, by blocking the entrance to the

Placement Service." (This Brief, p. 5). And, as indicated below, the law under which they were convicted was not one regulating the dissemination of ideas, but rather the common law offense of breach of the peace. Under these circumstances, we do not believe the occasion is presented for this Court to consider the claim of overbreadth. See the discussions in *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. National Dairy Prod. Corp.*, 372 U.S. 29 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 96-7 (1940). We believe this case rather is occasion for application of the rule that a person to whom application of a law is constitutional will not be heard to attack it on the ground that it may be taken as applying to other persons or other situations. *United States v. Raines*, 362 U.S. 17, 21 (1960).

Nevertheless, we believe the law is neither overly broad nor vague. In Kentucky, the common law exists *only* insofar as modified by the Constitution, the Legislature, and judicial decisions. *Wilson v. Commonwealth*, 290 Ky. 223, 160 S.W. 2d 649 (1942); *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W .2d 3 (1933). As indicated in the opinion of the Court below:

> "'The term "breach of peace" is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment.' *King v. Commonwealth*, 32 KLR 79, 80, 105 SW 419 (1907). To paraphrase the last portion of this quotation, conduct that is calculated to incite violence is a breach of peace. 'It includes not only violent acts but acts and words likely to produce violence in others.' *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.ed. 1213 (1940). However, *the literal breadth of the definition does not mean, and in this jurisdiction never has been construed to mean, that lawful and proper conduct may constitute a breach of peace just because it provokes violence or disorder. To the contrary, it was*

> *explicity recognized* in *West v. Commonwealth*, 208 Ky. 735, 271 SW 1079, 1081 (1925), *that the lawful exercise of a constitutional right* (the right of assembly) *cannot be a breach of peace.* We therefore do not feel that the law against breach of peace, as it has been thus construed in Kentucky, is so vague or overly broad in scope as to pose any threat to the rights of free speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. Cf. *Cox v. Louisiana*, 379 U.S. 536, 551, 85 S. Ct. 453, 13 L.ed. 2d 471 (1965). Indeed, it occurs to us that if there is any uncertainty in this context, it is not because the tried and settled law of breach of peace is vague, but because the burgeoning scope of the constitutional protections has become so." (441 S.W. 2d at 154, Brief for Appellant in this Court, p. 33.) (Emphasis added.)

We have been unable to find any case in which the common law offense of breach of peace as narrowly circumscribed by the Kentucky Court of Appeals has been declared unconstitutional. On the contrary, similar laws in the States of Connecticut, Illinois, New York, and Pennsylvania have been upheld in recent years, with due consideration of the opinions of this Court, against attacks such as that which appellants make. See *United States v. Woodard*, 376 F. 2d 136 (7th Cir. 1967) (Illinois); *Heard v. Rizzo*, 281 F. Supp. 720 (E.D.Pa. 1968), affirmed, 392 U.S. 646; *Barber v. Kinsella*, 277 F.Supp. 72 (D. Conn. 1967); *State v. Boles* 5 Conn. Cir. 22, 240 A.2d 920 (1967); *State v. Dorsey*, 4 Conn. Cir. 476, 235 A.2d 859 (1967) (cited only as indicating Connecticut offense is similar to ours); *United States v. Jones*, 244 F.Supp. 181 (S.D.N.Y. 1965), affirmed, 365 F.2d 675 (2d Cir. 1966). The discussions in those cases consider at great length the type contentions advanced by appellants, and reject them after careful consideration of the opinions of this Court in the light of laws not materially different from that involved in this case. We think they fairly demonstrate that, without exception, courts have considered the offence involved in this case as valid on its face.

With particular reference to the claim of vagueness, the court noted in *United States v. Woodard* that the term "breach of peace" has received a "fairly well defined gloss." In addition, see *Lynch v. State*, 2 Md App. 546, 236 A.2d 45 (1967), cert. denied, 393 U.S. 915.

Appellants contend *West v. Commonwealth*, 208 Ky. 735, 271 S.W. 1079 (1925), indicates constitutionally protected conduct can constitute a breach of the peace in Kentucky. (Brief for Appellants, p. 15). On the contrary, the holding in that case was exactly the opposite. We see no point in arguing what the result would be on the same facts today. Courts, including this one, continually decide cases in accordance with changes in the circumstances of our society. The significant aspect of the *West* case is that it clearly shows Kentucky's common law offense, as has always been the case, does not prsocribe constitutionally protected conduct. In a similar way, *Ashton v. Commonwealth*, Ky., 405 S.W. 2d 562 (1965) (dictum), reversed on other grounds, 384 U.S. 195 (1966), shows that the common law offense has been narrowed in Kentucky to comport with the Constitution.

The holding of the Kentucky Court of Appeals is not at all inconsistent with decisions of this Court. We will not undertake to discuss in detail the myriad cases in which this Court has struck down attempts by states to regulate or prohibit constitutionally protected conduct under the guise of breach of the peace or other laws overly broad in scope. We think it sufficient to state that in none of those cases did this Court indicate that a similar law, narrowly construed as Kentucky's is, is either vague or overly broad. Generally, the cases deal with laws construed to prohibit peaceful demonstrations and religious dissemination. See Annotations, 16 L.ed. 2d 1065 (1967), supplementing 93 L.ed. 1165, 2 L.ed. 2d 1715, 11 L.ed. 2d 1137; 16 L.ed. 2d 1241 (1967). In short, we think Kentucky's law fairly gives notice of what it prohibits, and does not import prohibition of constitutionally protected conduct. Cf. *United States v. National Dairly Prod Corp.*, supra; *Cameron v. Johnson*, 390 U.S. 611 (1968).

(2) APPELLANTS HAVE NOT BEEN CONVICTED FOR ENGAGING IN PROTECTED ACTS OF EXPRESSION.

Appellants do not deny the evidence shows they sat down in doorways to public offices blocking entrance thereto. (Brief for Appellants, pp. 5, 16). We have previously demonstrated that the jury were limited by the instructions to consideration only of the blocking of the door ways in determining the guilt or innocence of appellants. It is clear this conduct is not protected by the United States Constitution. Cf. *United States v. O'Brien*, 391 U.S. 367 (1968); *Adderly v. Florida*, 385 U.S. 39 (1966); *Feiner v. New York*, 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For a delineation between undisruptive, protected conduct at a school and the converse, see *Tinker v. Des Moines Community School District*, 393 U.S. 503, 21 L.ed. 2d 731, at 742, (1969).

(3) THERE IS UNCONTESTED EVIDENCE OF SUBSTANCE TO SUPPORT THE CONVICTIONS OF APPELLANTS.

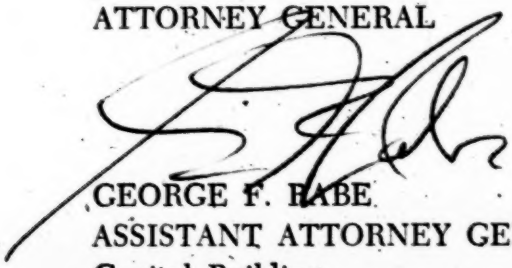
We think the concession noted above that appellants sat down blocking doorways to public offices disposes of their contention that there is no evidence whatsoever to support their convictions. The discussions in the *O'Brien*, *Adderly*, and *Tinker* cases so indicate. Unlike the petitioner in *Thompson v. Louisville*, 362 U.S. 199, 205-6 (1960), appellants did engage in conduct "likely . . . to adversely affect the good order and tranquillity" of the community.

CONCLUSION

Appellants were fairly convicted after a trial by jury with carefully limiting instructions under a law which fairly gave notice their conduct was prohibited. No question of substance is presented for the consideration of this Court and this appeal should be dismissed or the judgment of the Court of Appeals of Kentucky affirmed.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL



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DATED: October 10, 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1969

O'LEARY ET AL. *v.* KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 526. Decided November 17, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.